88-1521

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1988

RICHARD BOOTH . . . . . *Petitioner*

vs.

STATE OF ARKANSAS . . . . . *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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68pp

QUESTION PRESENTED

A. DOES THE INSTRUMENTALITY OF A CRIME EXCEPTION EXCUSE THE OFFICERS' FAILURE TO OBTAIN WARRANTS TO SEARCH AN IMPOUNDED VEHICLE ABSENT EXIGENT CIRCUMSTANCES OR SEARCH INCIDENT TO AN ARREST.

TABLE OF CONTENTS

QUESTION PRESENTED i

A. DOES THE INSTRUMENTALITY OF A CRIME EXCEPTION EXCUSE THE OFFICERS' FAILURE TO OBTAIN WARRANTS TO SEARCH AN IMPOUNDED VEHICLE ABSENT EXIGENT CIRCUMSTANCES OR SEARCH INCIDENT TO AN ARREST iii

Table of Authorities Cited iv

I. Opinion Below 2

II. Jurisdiction 2

III. Constitutional Provisions Involved

A. Constitutional Provision—4th Amendment . . 3

B. Constitutional Provision—14th Amendment . . 3

IV. Statement of Facts 4

V. Reasons for Granting the Writ

A. This case provides this Court with an opportunity to delineate the boundaries of the "instrumentality of a crime" exception to the warrant requirement for searching motor vehicles absent exigent circumstances or search incident to an arrest 7

B. The evidence taken from defendant's vehicles without a valid search warrant and absent exigent circumstances should have been suppressed 11

VI. Conclusion 24

TABLE OF AUTHORITIES

Cases:

Burkett v. State, 271 Ark. 150, 607 S.W.2d 399 (1980) 17

Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464 (1974) 9

Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975 (1970) 7

Freeman v. State, 258 Ark. 617, 527 S.W.2d 909 (1975) 8

McQueen v. State, 283 Ark. 232, 675 S.W.2d 358 (1984) 18

Scisney v. State, 270 Ark. 610, 605 S.W.2d 451 (1980) 17

Tillman v. State, 271 Ark. 552, 609 S.W.2d 340 (1980) 7

Rules and Statutes

28 U.S.C. §1257 (a)

Ark. Stat. Ann. §§ 41-5104 and 75-901

Ark. R. Crim. P., 10, 12, 13.1, 13.2 and 14

Other Sources

Fourth and Fourteenth Amendments of United States Constitution

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PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, RICHARD BOOTH, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Arkansas Court of Appeals entered in the above entitled cause on January 11, 1989.

I.

Opinion Below

The opinion of the Arkansas Court of Appeals is attached as Appendix A and is reported at 26 Ark. App. 115 (1989). The unreported opinion issued by the Circuit Court of Benton County, Arkansas, is attached as Appendix B. The substituted opinion on denial of rehearing of the Arkansas Court of Appeals is attached as Appendix C and is reported at 26 Ark. App. 115 (1989).

II.

Jurisdiction

The judgment of the Circuit Court of Benton County was filed on February 24, 1987.

The substituted opinion on denial of rehearing of the Arkansas Court of Appeals was filed on January 11, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257 (a).

III.

Constitutional Provisions Involved

A. The Fourth Amendment of the United States

Constitution provides:

AMENDMENT IV—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. The Fourteenth Amendment of the United States Constitution provides:

AMENDMENT XIV—Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IV.
Statement of Facts

In the early morning hours of December 9, 1984, Mark and Marcene Gilliland were killed in a hit and run accident while they were traveling south on State Highway 43 in Arkansas. Tire marks at the scene and paint transfers on the Gilliland vehicle led investigating officers to believe a northbound reddish-orange semi tractor-trailer was the second vehicle involved (Tr. 708-709). The investigating officer estimated the time of the accident as 1:15 a.m.

Witnesses placed defendant, RICHARD BOOTH, in the area the night before the accident driving a semi tractor-trailer, reddish-orange in color and leaving for Kansas between 12:50 and 1:30 a.m. (Tr. 539; 604; 619-620; 721).

Arkansas authorities asked Kansas authorities to locate Richard Booth to see if his vehicle evidenced damage consistent with their findings (Tr. 123). Kansas authorities located Mr. Booth's vehicle and seized it without a warrant (Tr. 126). Arkansas officials searched the vehicle twice and Kansas authorities searched it once while it was impounded without a search warrant ever being issued (Tr. 143; 147; 148). A seizure warrant was issued after first search had already taken place (Tr. 145-146).

Defendant was charged with two counts of

Manslaughter and one count of Leaving the Scene of an Accident Involving Death or Physical Injury in violation of Ark. Stats. Ann. Sec. 41-5104 and 75-901 (Tr. 5; 69).

Defendant moved to suppress all evidence and testimony resulting from the warrantless seizure and searches of defendant's vehicles arguing that his Fourth and Fourteenth Amendment rights had been violated. (Tr. 192, 15-21). Defendant's motion to suppress was overruled by the trial court which found exigent circumstances justified the warrantless searches. (Tr. 22-23 and Appendix B).

Defendant was tried to a jury, found guilty on all counts, and sentenced to ten years imprisonment and Ten Thousand Dollars fine on each Manslaughter count and to six years imprisonment and a Ten Thousand Dollar fine on the Leaving the Scene of an Accident Involving Death count. (Tr. 56).

Petitioner challenged the trial court's denial of his motion to suppress on appeal to the Arkansas Court of Appeals, citing the failure to suppress as a point relied upon for reversal of the trial court, as follows:

I.

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO SUPPRESS AND OBJECTIONS TO INTRODUCTION OF EVIDENCE TAKEN FROM DEFENDANT'S VEHICLES WITHOUT

A VALID SEARCH WARRANT, WITHOUT REASONABLE CAUSE AND ABSENT EXIGENT CIRCUMSTANCES.
(Appellant's Brief pp. 4, 171)

The Arkansas Court of Appeals affirmed the trial court's ruling, in a case of first impression in Arkansas, by extending the "instrumentality of a crime" exception to warrant requirements to petitioner's motor vehicle (Appendix C).

V.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PROVIDES THIS COURT WITH AN OPPORTUNITY TO DELINEATE THE BOUNDARIES OF THE "INSTRUMENTALITY OF A CRIME" EXCEPTION TO THE WARRANT REQUIREMENT FOR SEARCHING MOTOR VEHICLES ABSENT EXIGENT CIRCUMSTANCES OR SEARCH INCIDENT TO AN ARREST.

The Arkansas Court of Appeals in this case has impermissibly abrogated the warrant requirement for search of an impounded vehicle by extending the "instrumentality of a crime" exception to motor vehicles despite the absence of a search incident to an arrest or exigent circumstances.

In this case of first impression in the State of Arkansas, the Arkansas Court of Appeals applied the "instrumentality" exception to the warrant requirement to the warrantless search of a motor vehicle, thus abrogating the well established rule requiring both probable cause and exigent circumstances to justify the warrantless search of an automobile which has in the past been consistently followed by the United States Supreme Court and the Arkansas appellate courts. *See, e.g., Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1975 (1970); *Tillman v. State,* 271 Ark. 552, 604 S.W.2d (1980);

Freeman v. State, 258 Ark. 617, 527 S.W.2d 909 (1975).

In so ruling, this Arkansas Court of Appeals incorrectly applied recent state court opinions extending the exception to motor vehicles since appellant was not arrested prior to or contemporaneously with seizure of his vehicle as would be required by the cases relied upon in the Court's ruling, and also incorrectly stated the propriety of a warrantless search where the vehicle is the evidence or instrumentality of a crime is implicit in several United States Supreme Court decisions.

In order to uphold the warrantless searches of appellant's vehicles in this case, the Arkansas Court of Appeals relied upon the "instrumentality" exception to the search warrant requirement which was recently extended to some vehicle searches in *People v. Griffin*, — Cal.3d —, 761 P.2d 103, 25 Cal. Rptr. 643 (1988).

In so ruling this Court erroneously overlooked the significance of the fact that appellant was not arrested on the charges in this case until December 26, 1984, the information having been filed in Arkansas on December 20, 1984 (Tr. 5; Appendix i), even though his vehicle was seized without a warrant on December 9, 1984, some seventeen days **before** defendant was arrested and eleven days before he was charged with any crime, and searched repeatedly without a warrant prior to any charge being filed.

This error is of critical importance because in *Griffin*, and in the cases cited on this issue therein, the Court noted that the vehicles at issue were seized incidental to a lawful arrest of the defendant as evidence of the alleged crime, and later searched. Indeed, it was such a seizure incident to a lawful arrest upon which the Court relied in *Griffin* and in *People v. Teale*, 70 Cal.2d 497, 75 Cal. Rptr. 172, 450 P.2d 564 (1969), also cited by the Arkansas Court of Appeals, in ruling that no search had, in fact, occurred, since the vehicle was itself, evidence, subject to seizure incident to an arrest, *Griffin*, 761 P.2d at 110.

In the present case, no seizure incident to a lawful arrest occurred. Accordingly, the cases relied upon by the Arkansas Court of Appeals have no application to the present case. The United States Supreme Court and Arkansas cases requiring both probable cause and exigent circumstance to justify a warrantless search of a motor vehicle should have been applied to the present facts.

The Arkansas Court of Appeals also misstated the law with regard to motor vehicle search warrant requirements, relying on the reasoning in *Griffin* that the propriety of a warrantless search where the vehicle is the evidence or instrumentality of a crime is implicit in several United States Supreme Court decisions including *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Cooper v. California*, 386

U.S. 58 (1967), and *Carroll v. United States*, 267 U.S. 132 (1925).

Contrary to this Court's assertion, all of these cases recognize and restate the requirement of both probable cause and exigent circumstances before a warrantless search of a vehicle will withstand constitutional attack under the Fourth and Fourteenth Amendments.

Indeed, the trial court's ruling in the present case recognized the requirements of these cases and found, unlike the Arkansas Court of Appeals, that exigent circumstances existed in the present case to justify the warrantless searches of appellant's vehicle, specifically relying upon *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464 (1974), in support of its denial of appellant's motion to suppress (Tr. 23).

Application of the "instrumentality" exception to the warrant requirement for search of appellant's vehicle flies in the face of the United States Supreme Court's constant and continued recognition that a constitutionally protected expectation of privacy in a vehicle exists sufficient to invoke the warrant requirement even when, as in the present case, a vehicle is suspected of itself being evidence of a crime and is impounded. *Cardwell v. Lewis*, supra at 417 U.S. 594, citing *Chambers*, supra, 399 U.S. at 52.

The overextension of the "instrumentality"

exception to the warrant requirement for the search of impounded motor vehicles in *Griffin* and in the present case eviscerates the long-standing Fourth and Fourteenth Amendment warrant requirements previously set out by this Court and should be reviewed by this Court upon grant of petitioner's petition for writ of certiorari.

B. EVIDENCE TAKEN FROM DEFENDANT'S VEHICLES WITHOUT A VALID SEARCH WARRANT AND ABSENT EXIGENT CIRCUMSTANCES SHOULD HAVE BEEN SUPPRESSED.

At the pretrial suppression hearing and at the trial of this case, pursuant to the Fourth and Fourteenth Amendments to the United States Constitution, defendant sought to suppress and have excluded from evidence all photographs, paint and glass samples, test results and testimony resulting from seizure and four searches of defendant's vehicles conducted by Arkansas and Kansas law enforcement officials.

The trial court overruled defendant's motion to suppress stating that the exigency exception to the search warrant applied to the three latter searches, and that the plain view exception applied to the first search, citing *Cardwell v. Lewis*, 417 U.S. 583, 94 S.Ct. 2464 (1974) (Tr. 23). Defendant's objections to introduction of evidence based upon the search and seizure violations presented at the suppression hearing were likewise overruled

during the course of defendant's trial.

The requirements that the state obtain a specific search warrant prior to searching a vehicle and the contents of the warrant are set out in Arkansas Rules of Criminal Procedure 10, 12 and 14. One seizure and four separate searches of Mr. Booth's truck and trailer occurred in the present case. Each search will be discussed separately with regard to the applicable rules and case law.

At the suppression hearing, Trooper Boring and Sheriff Ron Moore, Allen County, Kansas, testified that defendant's truck and trailer were impounded on December 9, 1984, following their viewing of the vehicles allegedly conducted pursuant to the consent of defendant (Tr. 124-126; 141-142). No warrant was obtained for the seizure of defendant's vehicles prior to this impoundment and the state's witnesses did not contend that defendant consented to the impoundment.

From December 9, 1984, through December 21, 1984, it is undisputed that defendant's vehicles remained continuously in the sole and exclusive custody of Kansas police officials (Tr. 142, 148). Special procedures for locking the impound lot at all times were instituted for the duration of the impoundment of Mr. Booth's vehicles (Tr. 142).

On December 11, 1984, commencing at 3:40 and

concluding about an hour later, a warrantless search was conducted by Officer Fogley of the Arkansas State Police (Tr. 165). Trooper Fogley testified he did not obtain a warrant for his search nor obtain the consent of defendant (Tr. 165). Glass samples referred to in the report of Mr. Steve Cox, Arkansas Crime Lab, were taken from the bed of the trailer and numerous photographs were taken by Trooper Fogley during this search (Tr. 165-166). It is not contended that this search was made pursuant to an arrest and Trooper Fogley testified this was not an inventory or safekeeping search pursuant to Rule 12(6)(b), nor was there any exigency such as those enumerated in Rule 14.1 preventing him from obtaining a warrant prior to his search (Tr. 166).

On December 11, 1984, at approximately 5:40 p.m., a warrant was issued to Sheriff Moore directing him to search the fenced lot of the Kansas Department of Transportation and seize defendant's tractor and trailer (Def. Ex. 1) (Tr. 100-101, 145). The tractor and trailer were already impounded on the lot of the Kansas Department of Transportation at the time this warrant was issued (Tr. 143-144). Sheriff Moore testified he sought the warrant because defendant's attorney had requested return of the vehicle and said he would file a civil suit for its return and Sheriff Moore wanted to ensure that he could continue to hold the vehicle until it could be delivered to Arkansas authorities (Tr. 144-415). Sheriff Moore's purpose in obtaining this warrant is also set out in his affidavit in support of issuance of the

warrant. (Defendant's Exhibit 1, page 2) (Tr. 100-101).

Sheriff Moore testified that had he wanted permission to search the vehicle it would be his normal practice to set out with particularity the items sought for. This was not done because he sought and obtained only the authority to continue to hold the vehicles pending resolution of defendant's action to obtain their release (Tr. 155-156).

On December 21, 1984, during a morning hearing on defendant's petition for release of his vehicles, Sheriff Moore was advised by the County Attorney that things were not going well and it looked like the vehicles were going to be released. Prior to 12:00 a.m. on December 21, 1984, Sheriff Moore conducted a search of defendant's vehicles and obtained paint and glass samples listed in Mr. Cox's report from the State Crime Lab and in Sheriff Moore's own evidence custody receipt (Defendant's Exhibit 4, Tr. 156). Sheriff Moore obtained no warrant to search for particular items of evidence in or on defendant's vehicles and did not obtain the consent of defendant for the search. He further testified his search was not intended as one to inventory the contents of the vehicle but was, rather, an investigative search. He further stated there was no reason why he could not have obtained a warrant to search the vehicles during the twelve days they had been impounded (Tr. 155-157).

Subsequent to Sheriff Moore's search of the vehicle

on December 21, 1984, Sheriff Moore returned to his office and found an order from the District Court of Allen County, Kansas, directing him to release defendant's vehicles (Tr. 157). In spite of this order, filed at approximately 11:30, according to Sheriff Moore, he phoned his officer in charge of the impoundment lot and directed him not to release the vehicles to defendant and to continue to hold them until Arkansas Crime Lab personnel arrived and the County Attorney could prepare and file a notice of appeal (Tr. 160-162). Sheriff Moore testified this appeal was dismissed the next day after the fourth search of the vehicles conducted by Trooper Straub and the Arkansas Crime Lab on the evening of December 21, 1984. Mr. Booth's vehicles were returned to him as previously ordered (Tr. 149).

At about 7:10 p.m. on December 21, 1984, according to Sheriff Moore's testimony and his evidence custody receipt, a fourth search of defendant's vehicles was conducted by Arkansas authorities which lasted well into the night. The items seized during this search are set out in the report of Mr. Cox, State Crime Lab (Tr. 172-174), including paint samples taken from underneath the fenderwell and framerail of Mr. Booth's trailer and from the top of the trailer bed, and including and check of the brake system while operating the truck (Tr. 88-89; 175). Numerous photographs were taken by Mr. Page, also of the State Crime Lab, including the interior of the cab of the truck (Tr. 88; 1191-1192).

According to the testimony of Officer Straub and Mr. Cox, no search warrant was obtained prior to this search nor was the consent of the defendant obtained (Tr. 117; 176). Even though Officer Straub purports to have been acting pursuant to the seizure warrant obtained on December 11, 1984, by Sheriff Moore, he concedes that upon his arrival he was made aware by Sheriff Moore that a search of the vehicles had already been conducted, the product of which was delivered to Officer Straub at 7:10 (Tr. 107; 115-116-117). Officer Straub did not testify to any emergency preventing him from obtaining a warrant for his search, stating he relied on the December 11, 1984, warrant. This fourth search of the vehicles was also clearly investigative rather than custodial and the state does not contend otherwise.

The warrant issued to Sheriff Moore was never intended by him to authorize search of defendant's vehicles and thus sets out no particular items to be searched for within or upon defendant's vehicles. To the extent this warrant was relied upon, if at all, by Officer Straub as a search warrant, it is on the face invalid for this absence of particularity as prohibited by Rules 13.1 and 13.2, and also would not support a second search by Arkansas authorities after it had already been executed by Sheriff Moore. Sheriff Moore clearly did not rely on this warrant for his search since he personally obtained the warrant for the sole purpose of holding the vehicles until they could be turned over to Arkansas authorities.

Until the Court of Appeals ruling which is the subject of this petition, Arkansas courts have repeatedly and uniformly held that officers must obtain a warrant prior to searching vehicles within the exclusive control of the police, in the absence of exigent circumstances or consent. *Scisney v. State*, 270 Ark. 610, 605 S.W.2d 451 (1980); *Burkett v. State*, 271 Ark. 150, 607 S.W.2d 399 (1980). This requirement was more recently reaffirmed by implication in *Tillman v. State*, 271 Ark. 552, 609 S.W.2d 340 (1980), permitting an immediate search of a vehicle on a public highway if the car's contents may never be found again rather than seizing the car and obtaining a warrant, since either course is reasonable. In the present case, defendant's vehicles were already impounded at the time of the last three searches and, accordingly, the exigency exception set out in *Tillman* is inapplicable. Only one reasonable course of action remained, to obtain a search warrant, which was never obtained in this case.

The court in *Tillman* pointed out that in order to justify a warrantless search of an automobile, both probable cause for the search and exigent circumstances must be present, citing *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975 (1970), and *Freeman v. State*, 258 Ark. 617, 527 S.W.2d 909 (1975). Neither is present in the case at bar.

In *Freeman*, the court held that although police had probable cause for seizure of defendant's automobile,

the evidence indicated no exigent circumstances such as to excuse the requirement that a warrant be obtained before the vehicle was seized. The court ruled that use of photographs taken after the warrantless seizure was therefore improper. In so doing the court noted the vehicle, as in the present case, was not seized to protect the public safety or safeguard the owner's property, was not being used for any illegal purpose or for escape, and that the possible connection of the vehicle to the crime was known to the officers when they initially saw it.

As discussed in both *Tillman* and *Freeman*, *Chambers* requires both probable cause and exigent circumstances to justify the warrantless search of an automobile. The heavy reliance placed upon *Chambers* in Arkansas automobile search and seizure cases is particularly important in the present case because *Cardwell v. Lewis*, supra, relied upon by the trial court in support of its order denying defendant's motion to suppress, likewise relies on the *Chambers* decision and quotes that portion of *Chambers* requiring a finding of both probable cause and exigent circumstances before a warrantless search of a vehicle will be found reasonable, as follows:

> For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without

> a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> . . . The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained.
> *Cardwell*, supra, at 417 U.S. 594, citing *Chambers*, 399 U.S. at 52.

The trial court's reliance upon *Cardwell*, supra, in support of its denial of defendant's motion to suppress and objections to admission of evidence and testimony, is also misplaced because that case is distinguishable on its facts.

The court in *Cardwell* ruled evidence of paint scrapings from a car fender admissible, noting that an exigency existed even while the vehicle was in a police parking lot because someone might be instructed to remove the car from the lot and any evidence would be lost. In the present case no such exigency existed. Defendant's truck and trailer were not only taken to a police parking lot but were indeed impounded in a

fenced detention area. Special procedures to keep the enclosure locked and monitored at all times were initiated immediately upon arrival of the Booth vehicles at the impound facility. In addition, all of the witnesses at the suppression hearing testified that there were no exigent circumstances preventing them, had they so desired, from obtaining a warrant prior to any of the the searches of the vehicle. Indeed, the vehicle was in police custody for twelve days, with no search warrant ever being sought by either Kansas or Arkansas authorities despite repeated searches by both. No exigency whatsoever exists or is even asserted in the present case to justify the failure of all authorities involved in the search of defendant's vehicles to obtain a warrant and to specify what they were searching for prior to the search.

Cardwell is also distinguishable from the present case because in *Cardwell*, only visible paint scrapings from the rear fender were taken during the search and no search of the interior of the car occurred. But in the present case, a much more extensive search was undertaken, including taking paint scrapings from the undercarriage and underneath the framerail of the trailer plus glass samples photographed and taken from a position on top of the trailer bed. Further, the interior of the cab was searched, the vehicles were driven and the brakes tested during this process. Evidence from inside the cab included testimony that defendant had a C.B. radio therein (State's Exhibit 58, Tr. 1191-1192). In addition, photographs of the interior and testimony were

introduced at trial to bolster the State's argument that defendant left Mick's Place in Oklahoma without giving his brakes time to fully pressurize, thus causing a screeching sound audible to witnesses within the bar and upon the testimony of the time of defendant's departure was based. Questioning by the State of its witness, Trooper Westgate, which directly addressed the functioning of the interior of defendant's vehicle and operable condition of the brakes was phrased in terms of the possibility of the driver being drunk and reaching over and by mistake or a reason such as being drunk, hitting the wrong brake button inside the cab and dragging the trailer (Tr. 1193).

The trial court's argument, citing *Cardwell*, that the reasonableness of seizing vehicles under exigent circumstances is not foreclosed if a warrant was not obtained at the first practicable moment must fail because no warrant to search defendant's vehicle was ever obtained by any of the officers involved in the searches and no exigency was ever suggested which prevented producing one during the twelve days the vehicles were in the exclusive custody of the police.

The trial court quotes *Cardwell* for the proposition that an exigency may arise at any time and the fact that police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action, noting defendant's attempt to regain his vehicle created an exigency

sufficient to justify the warrantless searches. Certainly this argument has no application to the search by Sergeant Fogley on December 9, 1984, before defendant had even filed a suit for return of his vehicle. Any application of this argument to the searches on December 21st would require a holding by this Court that State authorities are entitled to avoid search warrant requirements when the case is ruled upon the basis of an "exigency" of their own creation. The trial court's suggestion that defendant's actions to regain custody of his own vehicle created an exigency justifying a warrantless search, in spite of intentional police inaction while a suit for return of the vehicle was pending, creates a catch-22 situation in which any and every vehicle could be searched without a warrant so long as the police maintained custody of the vehicle until the owner asked for it back. Surely the Fourth and Fourteenth Amendments protection against unreasonable searches and seizures and the long established exigency requirement cannot be eliminated so easily, particularly where, as here, the so-called exigency was avoided by the authorities who ignored the court order to release the vehicles until they were satisfied all desired warrantless searches had been conducted.

The plain view doctrine has no application in the present case since the initial intrusion was not lawful, the glass and paint samples were not discovered nor taken inadvertently and the incriminating nature of the

evidence, if any, was not immediately apparent, thus giving rise to subsequent testing by the State Crime Lab. *McQueen v. State*, 283 Ark. 232, 675 S.W.2d 358 (1984).

The three warrantless searches of defendant's vehicles conducted by Arkansas and Kansas authorities while his vehicles were impounded clearly constitute a substantial and unreasonable violation of defendant's Fourth and Fourteenth Amendment rights to be free of unreasonable searches and seizures. There was no proof that the evidence obtained during these searches would have been obtained but for the warrantless searches and defendant was severely prejudiced by such evidence in his ability to defend himself in the trial of this case. Defendant's motion to suppress all evidence seized or resulting from these warrantless searches of defendant's vehicles should have been granted, and the trial court's denial of this motion should have been reversed by the Arkansas Court of Appeals.

CONCLUSION

This case presents an important constitutional issue regarding the boundaries of the "instrumentality of a crime" exception to search warrant requirements for motor vehicles. This Court has an opportunity to clarify the limits and boundaries of the "instrumentality" exception with regard to motor vehicles where the search is not conducted incident to an arrest, and no exigent circumstances exist. This case has established a dangerous precedent which, if not clarified, other lower courts might unwisely choose to adopt.

Respectfully submitted,

RICHARD BOOTH, *Petitioner*

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Attorney for Petitioner

March 6, 1989

PROOF OF SERVICE

PRISCILLA KAREN POPE, after being sworn, deposes and says that pursuant to Rule 28.3 of this Court she served all parties required to be served with the within PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS by enclosing three (3) copies thereof in an envelope, first class postage prepaid, addressed to:

Mr. Steve Clark
Arkansas Attorney General
201 East Markham
Heritage West Building
Little Rock, Arkansas 72201

and depositing same in the U.S. Mail at Fayetteville, Arkansas, on 10 March 1989.

PRISCILLA KAREN POPE, *Affiant*
P. O. Box 3423
Fayetteville, AR 72702
(501) 443-3985

Subscribed and Sworn to before
me this 7th day of March, 1989.

PATRICIA LINTHICUM
Notary Public in and for
Washington County, State of
Arkansas.

Appendix A

DIVISION I
ARKANSAS COURT OF APPEALS

No. CACR 88-34

Richard Booth

Appellant

v.

State of Arkansas

Appellee

Opinion Delivered December 7, 1988

AN APPEAL FROM BENTON COUNTY
CIRCUIT COURT, FIRST DIVISION

HONORABLE WILLIAM H. ENFIELD,
CIRCUIT JUDGE

AFFIRMED

DONALD L. CORBIN, *Chief Judge*

This appeal comes to us from Benton County

Circuit Court, First Division. Appellant, Richard Booth, appeals from a judgment entered on July 22, 1987, wherein he was found guilty of leaving the scene of an accident involving death or personal injury, a violation of Arkansas Code Annotated §27-53-101 (Supp. 1987) and two counts of manslaughter, a violation of Arkansas Code Annotated §5-10-104 (1987) and the sentences and fines imposed therefor. We affirm.

A felony information was filed December 20, 1984, charging appellant with leaving the scene of an accident involving death or physical injury and another filed April 23, 1985, charging appellant with two counts of manslaughter for the deaths of Mark and Marcene Gilliland. Prior to trial, appellant moved to suppress all evidence obtained in violation of his fourth and fourteenth amendment rights against unreasonable searches and seizures. The court denied appellant's motion and the charges were tried to a jury which found appellant guilty on all counts and sentenced him to six years imprisonment and a $10,000 fine for leaving the scene of the accident and ten years imprisonment and $10,000 fine on each manslaughter conviction. From the judgment, comes this appeal.

Appellant raises the following two points for reversal: 1) The trial court erred in denying defendant's motion to suppress and objections to introduction of evidence taken from defendant's vehicle without a valid search warrant, without reasonable cause and absent

exigent circumstances; 2) the trial court erred in denying defendant's motions for a directed verdict because the state failed to introduce any substantial evidence from which the jury could find the requisite intent or identify the defendant as the perpetrator of either charge beyond a reasonable doubt.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Vandercamp v. State*, 19 Ark. App. 361, 721 S.W.2d 680 (1986). When there is a challenge to the sufficiency of the evidence, the court must review that point prior to considering any alleged trial error. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In determining the sufficiency of the evidence, we consider all evidence, including any which may have been inadmissible, in the light most favorable to appellee. Id. We will affirm the conviction on appeal if there is any substantial evidence to support the verdict. *McCoy v. State*, 293 Ark. 49, 732 S.W.2d 156 (1987). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

Appellant was convicted of violating the manslaughter statute which provides that a person commits manslaughter if he recklessly causes the death of another. "Recklessly" is defined in Arkansas Code Annotated §5-2-202(3) (1987) as follows:

> (3) "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation[.]

Appellant contends that there was insufficient evidence to identify him as the perpetrator of the crimes charged or to establish that his conduct was "reckless" as required by the manslaughter statute. Viewed in the light most favorable to appellee, the evidence reveals that at approximately 1:15 a.m. on December 9, 1984, Mark and Marcene Gilliland were killed in a hit and run automobile accident on Highway 43 near Siloam Springs, Arkansas. Physical evidence at the scene reveals that the Gilliland vehicle was traveling south on the highway and the fleeing vehicle was a reddish-orange tractor-trailer rig traveling north.

A police investigation ensued and based upon physical and verbal evidence gathered, appellant was implicated as the driver of the vehicle that left the scene of the accident in which the Gillilands were killed. A

compilation of the evidence generally reveals that Michael Wacker hired appellant to deliver hay to his farm near Gentry, Arkansas. Appellant, a Kansas resident, delivered the hay on December 8, 1984, and then went to Mick's Place, a bar owned by Michael and Dee Wacker in Sandusky, Oklahoma. Mr. Wacker testified that he arrived at the bar at approximately 3:00 p.m. and appellant was already there. Mr. Wacker stated that appellant was drinking at that time and was very argumentative and disruptive toward the other customers.

Dee Wacker testified that she arrived at the bar around 6:00 p.m. and observed that appellant was intoxicated, belligerent and talking vulgar. The Wackers refused to serve appellant any alcoholic beverages after 6:00 p.m. or 7:00 p.m. because of his intoxicated condition. Appellant became angered by this and attempted to take drinks from other customers. At approximately this time, it was determined that appellant's tractor-trailer was parked partially on the highway. Appellant was too intoxicated to get into the cab of the truck and another patron of the bar moved the vehicle off the road for him. At that time, Mr. Wacker took appellant's truck keys so he could not drive.

Appellant left Mick's Place with a woman to go to another bar to drink at 8:30 p.m. or 9:00 p.m. He returned an hour or an hour and one-half later in a more intoxicated condition and remained at Mick's Place until

it closed. Although the Wackers tried to persuade appellant to stay overnight at their apartment, he insisted on driving back to his home in Kansas. The evidence is inconclusive as to the exact time of appellant's departure. Dee Wacker testified that appellant drove away from the bar between 12:50 a.m. and 1:00 a.m. on December 9, 1984, while Michael Wacker estimated appellant's departure time as between 1:00 a.m. and 1:10 a.m. There was evidence presented that the clock in the bar was set back ten minutes.

Pursuant to a conversation Mr. Wacker had with appellant, Wacker testified that appellant was planning on driving home on Highway 43 to avoid going through Gentry, Arkansas, because he previously received a DWI citation in that town. Appellant left on Highway 12 going toward the Highway 43 junction. When appellant left Mick's Place the brakes on his truck did not have enough air pressure and the vehicle skidded ten or twenty feet. Testimony indicated that appellant's vehicle made loud, screeching noises as he drove away.

Don Blagg, who lives at the intersection of Highways 43 and 12 on the Oklahoma-Arkansas border, testified that he was awakened at 1:00 a.m. on December 9, 1984, by a rumbling noise which sounded like a truck running off the road. Later Mr. Blagg saw skid marks on Highway 43 consistent with the noise he heard.

The persons with whom the Gillilands spent the

evening of December 8, 1984, also testified. Collectively their testimony reveals that on this evening the victims were guests in the home of Carl Bonner. The Gillilands, along with the other guests, left the Bonner residence at approximately 1:00 a.m. on December 9, 1984, and arrived at Highway 43 somewhere around 1:00 a.m. to 1:05 a.m.

The accident was discovered by Mike Burrow and Doug McAfee on December 9, 1984, between 12:30 a.m. and 1:15 a.m. as they were traveling north on Highway 43. Mr. Burrow testified that there were fresh dual tire marks from a large truck on the highway and the side of the victims' tan vehicle had red paint on it. When these young men were interviewed at the scene neither told authorities that they met a vehicle on the highway before encountering the accident scene. However, approximately eight days after the accident, Mr. McAfee telephoned the police to inform them that he remembered being run off the road on that evening by a long-nose tractor with a flatbed trailer. Mr. McAfee did not testify at trial; however, Mr. Burrow's testimony reveals that they did not meet any vehicles on the highway prior to discovering the Gilliland vehicle and were not run off the road by a semi-truck.

The evidence reveals that the victims' vehicle is a 1981 tan colored Ford Escort and the appellant's vehicle is a 1976 Peterbilt cab-over brown and white tractor with a reddish-orange flatbed trailer. Physical evidence was

presented that indicated that appellant's tractor-trailer was the vehicle which left the scene of the accident in which the Gillilands were killed. From all the evidence gathered, the estimated time of the accident was 1:15 a.m. on December 9, 1984.

Numerous police officers testified about the condition of both vehicles. Their testimony generally reveals that the skid marks at the scene were made by a large truck traveling north. Comparable dual skid marks were found from Mick's Place to the Blagg residence, as well as in every curve leading to the scene of the accident. The victims' car was knocked approximately thirty-five feet off the highway sustaining primary damage to the driver's side. Red paint transfers were found on the hood, left front quarter panel, and door of the victim's tan car. Based upon the skid marks and location of damage to the victims' car, the authorities began looking for a reddish-orange tractor-trailer rig with damage to the driver's side.

A search of appellant's vehicle revealed evidence of recent damage consistent with their conclusions. There was a six to eight inch tan paint transfer above the bumper of the tractor and the same color paint transfer along the left side of the trailer bed approximately six feet in length. The front left axle of the rear tires was pushed back approximately one foot and the tires on the left side of the front axle were flat. Also, particles of glass and tan paint chips were found on the top and

bottom of the trailer. The trailer bed was dirty except in the areas where the tan paint was transferred. These areas revealed a clean surface and the part of the trailer scraped down to the base revealed a shiny and rust-free surface indicating a recent scrape. As further proof that the two vehicles collided, evidence was presented that the distance from the ground to where the paint transfers began on appellant's trailer was thirty-four and one-half inches and the distance from the ground to the bottom part of the red paint transfers on the victim's car was also thirty-four and one-half inches.

Steve Cox, the Chief Criminalist of the Arkansas State Crime Laboratory testified that he performed tests comparing paint and glass samples removed from both the Gilliland vehicle and appellant's vehicle. Based upon scientific testing methods, Mr. Cox testified that the tan paint found on appellant's trailer came from a 1981 Ford product and could have come from the appellant's 1981 Ford Escort. Also, he concluded that the red paint found on the victims' car could have come from appellant's trailer. Mr. Cox also testified that five of the nine analyzed glass samples taken from appellant's trailer matched the blass samples taken from the victims' car. Mr. Cox concluded that the odds that the two vehicles did not come into contact with each other are "extremely remote."

Appellant argues that the above facts are insufficient to support his conviction. We disagree. Guilt

need not always be proven by direct evidence. Circumstantial evidence can present a question to be resolved by the trier of fact and be the basis to support a conviction. *Yandell v. State*, 262 Ark. 195, 555 S.W.2d 561 (1977). We have often said that the fact that evidence is circumstantial does not render it insubstantial. See, e.g., *Ashley v. State*, 22 Ark. App. 73, 732 S.W.2d 872 (1987). The jury is allowed to draw any reasonable inference from circumstantial evidence to the same extent that it can from direct evidence. *Payne v. State*, 21 Ark. App. 243, 731 S.W.2d 235 (1987).

Viewing the above and all evidence of record in the light most favorable to appellee, we find substantial evidence from which the jury could have found appellant guilty of the crimes charged and that his conduct was reckless and exhibited a conscious disregard of a perceived risk. Therefore, we affirm as to appellant's second point for reversal.

Lastly, we address appellant's argument that the trial court erred in denying his motion to suppress and objections to introduction of evidence taken from appellant's vehicles without a valid search warrant, without reasonable cause and absent exigent circumstances.

At the pretrial suppression hearing and throughout the trial, appellant sought to suppress all photographs, paint and glass samples, test results and testimony from

the seizure and subsequent searches of appellant's vehicle obtained in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

The record reveals that Officer Edward Boring, a trooper for the Kansas Highway Patrol, received a call on December 9, 1984, from the Arkansas State Police stating that appellant was suspected of being involved in a hit and run accident near the Oklahoma-Arkansas border involving two fatalities. The Kansas authorities also received an independent lead which implicated appellant. The Kansas officer was told that the vehicle that left the scene was a flatbed red or burnt orange tractor-trailer with damage to its left side and the victims' car was a tan Ford Escort. Kansas officers spoke to appellant at his home on that day and obtained his permission to look at his vehicle. Appellant told the officers that his truck was parked at a local tavern. Upon looking at the vehicle, the officers determined that it was the vehicle that had been involved in the fatal accident. Photographs were taken of the vehicle parked at the tavern.

The officers returned to appellant's home and read him his *Miranda* warnings. During a brief period of questioning, appellant admitted delivering hay to Arkansas on the previous day but refused to tell the time he returned home. The vehicle was impounded after appellant's arrest and remained in the custody of the

Kansas authorities until December 21, 1984. The vehicle was examined and various paint and glass samples were removed on December 11, 1984, and on December 21, 1984.

It is well settled that an officer may conduct searches and make seizures without a warrant if consent is given to the search. Ark. R. Crim. P. 11.1. Additionally, any weapons or other things used or likely to be used as means of committing a criminal offense are permissible objects of seizure. Ark. R. Crim. P. 10.2.

Here, appellant gave the authorities consent to view his vehicle; however, even absent such consent, the appellant had no reasonable expectation of privacy to the outside of his tractor-trailer parked on a public street in front of a tavern. *See, e.g., Cardwell v. Lewis*, 417 U.S. 583 (1974). Upon viewing the vehicle, the police had probable cause to believe that appellant's vehicle was the instrument of the deaths and was the item to be seized and examined for evidence. While this issue has not arisen in this state, other jurisdictions have addressed the seizure of vehicles because of their potential evidentiary value as the "instrumentality of the crime."

In the recent case of *People v. Griffin*, ____ Cal.3d____, 761 P. 2d 103, 251 Cal. Rptr. 643 (1988) the Supreme Court of California upheld the warrantless search of the defendant's impounded truck on the ground of the "instrumentality " exception to the warrant

requirement, i.e., that the vehicle itself was an instrumentality of the crime or was itself evidence. In *Griffin*, the appellant's van had a bloody shoe print on the floorboard which appeared to match a bloody shoe print found at the scene of the murder. The court found that the bloodstains that had soaked into the floorboard of the truck were clearly an appropriated subject of scientific examination and within the limits of the instrumentality exception.

In the vehicular assault case of *People v. Zamora*, 695 P.2d 292 (Colo. 1985) the court upheld the warrantless search of an impounded automobile because it was legally seized as evidence itself based on the victim's description of the car and identity of the driver. The court held that when an object is lawfully seized and the police have a reasonable belief that the object is itself evidence of the commission of a crime, a subsequent examination of the object made proximate in time to the seizure, and undertaken for the purpose of determining its evidentiary value, is not an unlawful search.

In *People v. Teale*, 70 Cal.2d 497, 450 P.2d 564, 75 Cal. Rptr. 172 (1969) the court upheld the warrantless seizure of an automobile in which police had cause to believe that the victim was shot. The officers seized the car incident to lawful arrest and ten days later the car was examined by a criminologist who found the victim's blood splattered on the interior. In that case the court

found no violation of the fourth amendment because the automobile was itself evidence subject to seizure. The court analogized the situation to a case in which a person suspected of homicide is found in possession of a gun. It stated that it has never been held that a search warrant is necessary to enable the police to perform ballistic testing to determine if the gun was the one used in the killing. The *Teale* court, quoting *People v. Webb*, 66 Cal. 2d 107, 424 P. 2d 342, 56 Cal. Rptr. 902 (1967) also stated:

> The implication is that when the police lawfully seize a car which is itself **evidence** of a crime rather than merely a container of incriminating articles, they may postpone searching it until arrival at a time and place in which the examination can be performed in accordance with sound scientific procedures.

Teale, 66 Cal.2d at ____, 450 P.2d at 570-571, 75 Cal. Rptr. at 178-79.

This principle was again followed in *State v. Lewis*, 22 Ohio St. 2d 125, 258 N.E.2d 445, *cert. denied*, 400 U.S. 959 (1970), where it was held that since there was reasonable ground to believe that defendant's automobile was an instrumentality used in committing a murder, removal of paint samples for scientific examination was neither a search nor a

seizure. No search warrant was required to validate the examination even though the examination was conducted at a place and time remote from the seizure.

The propriety of a warrantless seizure and search where the vehicle is the evidence or instrumentality of a crime is implicit in several United States Supreme Court decisions as well. *See e.g., Cardwell v. Lewis*, 417 U.S. 583 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Cooper v. California*, 386 U.S. 58 (1967); *Carroll v. United States*, 267 U.S. 132 (1925).

In reviewing a trial judge's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances. We reverse only if the trial judge's ruling was clearly against the preponderance of the evidence. *Cook v. State*, 293 Ark. 103, 732 S.W.2d 462 (1987). Additionally, the trial judge has discretion in deciding evidentiary issues and his decision will not be reversed on appeal unless he has abused his discretion. *Hoback v. State*, 286 Ark. 153, 689 S.W.2d 569 (1985). Based upon our independent determination, the total circumstances reveal that the officers lawfully seized appellant's vehicle as a permissible object of seizure after viewing it with his consent. Upon inspection of the vehicle, the police had a reasonable belief that it was evidence of the

commission of a crime. Since the initial seizure was legal and since the reason for and nature of the custody of the vehicle was to use it as evidence, the subsequent warrantless searches were not unconstitutional. From the facts stated and the cases listed above, we find no error in the trial court's denial of the motion to suppress nor do we find that the trial court abused its discretion in allowing in evidence obtained from the search and seizure of appellant's vehicle. Therefore, the case must be affirmed.

Affirmed.

Cooper and Mayfield, JJ., agree.

A
Appendix B

IN THE CIRCUIT COURT
OF BENTON COUNTY, ARKANSAS

State of Arkansas Plaintiff

vs Nos. CR-86-191-1 and CR-86-192-1

Richard W. Booth Defendant

ORDER

On December 9, 1984, in the early morning hours the victims' vehicle was struck by another vehicle which was determined at the scene to be a semi-tractor-trailer, rust color, headed northbound on State Highway 43. Arkansas State Police officers obtained information that Defendant had been in the vicinity during the previous evening and had left a bar in an intoxicated condition at a time which would have placed him at the site of the accident at the time it occurred. The vehicle which Defendant was known to have been driving matched the description of the vehicle sought by the officers. The officers also had information that Defendant would be traveling Highway 43 North back to Kansas, that the tractor-trailer would be damaged on the left rear side, and would have tan paint on it transferred from the victims' vehicle. With this information Trooper Keith

Ferguson contacted Trooper Ed Boring of the Kansas Highway Patrol. Troopers Boring and Westgate went to Defendant's residence and asked him if he owned a tractor-trailer rig, the location of it, and if they could look at it. Defendant told them the location of the rig, and consented to their viewing it. They found it parked on a public street in front of the Landmark Tavern in Moran, Kansas. They saw the rig, rust colored, with tan paint transfers and damage to the left rear side. They seized the vehicle and caused it to be stored at a secure impoundment belonging to the State of Kansas.

The troopers then returned to Defendant's residence, advised him of his rights and asked him if he had been in Arkansas the night before. He confirmed that he had, but he refused to talk further when asked what time he returned to Kansas. No attempt was made to question him further.

Subsequently, while the rig remained in impoundment officers took photographs of it, removed glass from the truck bed, and removed paint scrapings from the side of the truck for chemical analysis.

Defendant contends that the viewing of the rig on a public street constituted a search. Even if it did, the law is clear that the viewing on public street does not constitute an unreasonable search proscribed by

Arkansas Criminal Rules. Defendant could have had no reasonable expectation of privacy in the vehicle under the circumstances. *Cardwell vs. Lewis*, 417 U.S. 583.

The vehicle was seized and impounded upon reasonable cause to believe it constituted evidence of a crime. Once seized and impounded the vehicle was examined and evidence taken. At that time Defendant was aware of the officers' interest in the vehicle and, as a consequence, the motivation to remove evidence from official custody was increased. This is the very reason for the automobile exception to the requirement for a search warrant.

Defendant contends that the search for evidence once the vehicle had been impounded was unreasonable because probable cause to search it existed for some time prior to the search, thus no exigent circumstances. In *Cardwell v. Lewis*, supra, the U.S. Supreme Court held that the right to search on probable cause and the reasonableness of seizing the vehicle under exigent circumstances are not foreclosed if a warrant was not obtained at the first practicable moment. "The exigency may arise at any time, and the fact that the police might have obtained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action." In this case, the exigency developed primarily from Defendant's actions in court to regain

custody of his vehicle.

Lastly, Defendant argues that the first search of the vehicle was the fruit of an admission by Defendant concerning the location of his vehicle before he was given the Miranda warning. That warning was unnecessary at the time because Defendant was not in custody and the officers were still investigating. Defendant was not accused at that time, hence the warning was not required.

The motions to suppress are accordingly overruled.

W. H. ENFIELD

Entered: 24 February, 1987

Appendix C

DIVISION I
ARKANSAS COURT OF APPEALS

No. CACR 88-34

Richard Booth

Appellant

v.

State of Arkansas

Appellee

Opinion Delivered January 11, 1989

AN APPEAL FROM BENTON COUNTY
CIRCUIT COURT, FIRST DIVISION

HONORABLE WILLIAM H. ENFIELD,
CIRCUIT JUDGE

SUBSTITUTED OPINION ON
DENIAL OF REHEARING

DONALD L. CORBIN, *Chief Judge*

This appeal comes to us from Benton County Circuit Court, First Division. Appellant, Richard Booth, appeals from a judgment entered on July 22, 1987, wherein he was found guilty of leaving the scene of an accident involving death or personal injury, a violation of Arkansas Code Annotated §27-53-101 (Supp. 1987) and two counts of manslaughter, a violation of Arkansas Code Annotated §5-10-104 (1987) and the sentences and fines imposed therefor. We affirm.

A felony information was filed December 20, 1984, charging appellant with leaving the scene of an accident involving death or physical injury and another filed April 23, 1985, charging appellant with two counts of manslaughter for the deaths of Mark and Marcene Gilliland. Prior to trial, appellant moved to suppress all evidence obtained in violation of his fourth and fourteenth amendment rights against unreasonable searches and seizures. The court denied appellant's motion and the charges were tried to a jury which found appellant guilty on all counts and sentenced him to six years imprisonment and a $10,000 fine for leaving the scene of the accident and ten years imprisonment and $10,000 fine on each manslaughter conviction. From the judgment, comes this appeal.

Appellant raises the following two points for reversal: 1) The trial court erred in denying defendant's motion to suppress and objections to introduction of evidence taken from defendant's vehicle without a valid

search warrant, without reasonable cause and absent exigent circumstances; 2) the trial court erred in denying defendant's motions for a directed verdict because the state failed to introduce any substantial evidence from which the jury could find the requisite intent or identify the defendant as the perpetrator of either charge beyond a reasonable doubt.

A motion for a directed verdict is a challenge to the sufficiency of the evidence. *Vandercamp v. State*, 19 Ark. App. 361, 721 S.W.2d 680 (1986). When there is a challenge to the sufficiency of the evidence, the court must review that point prior to considering any alleged trial error. *Harris v. State*, 284 Ark. 247, 681 S.W.2d 334 (1984). In determining the sufficiency of the evidence, we consider all evidence, including any which may have been inadmissible, in the light most favorable to appellee. Id. We will affirm the conviction on appeal if there is any substantial evidence to support the verdict. *McCoy v. State*, 293 Ark. 49, 732 S.W.2d 156 (1987). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Phillips v. State*, 17 Ark. App. 86, 703 S.W.2d 471 (1986).

Appellant was convicted of violating the manslaughter statute which provides that a person commits manslaughter if he recklessly causes the death of another. "Recklessly" is defined in Arkansas Code

Annotated §5-2-202(3) (1987) as follows:

> (3) "Recklessly." A person acts recklessly with respect to attendant circumstances or a result of his conduct when he consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of a nature and degree that disregard thereof constitutes a gross deviation from the standard of care that a reasonable person would observe in the actor's situation[.]

Appellant contends that there was insufficient evidence to identify him as the perpetrator of the crimes charged or to establish that his conduct was "reckless" as required by the manslaughter statute. Viewed in the light most favorable to appellee, the evidence reveals that at approximately 1:15 a.m. on December 9, 1984, Mark and Marcene Gilliland were killed in a hit and run automobile accident on Highway 43 near Siloam Springs, Arkansas. Physical evidence at the scene reveals that the Gilliland vehicle was traveling south on the highway and the fleeing vehicle was a reddish-orange tractor-trailer rig traveling north.

A police investigation ensued and based upon physical and verbal evidence gathered, appellant was implicated as the driver of the vehicle that left the scene

of the accident in which the Gillilands were killed. A compilation of the evidence generally reveals that Michael Wacker hired appellant to deliver hay to his farm near Gentry, Arkansas. Appellant, a Kansas resident, delivered the hay on December 8, 1984, and then went to Mick's Place, a bar owned by Michael and Dee Wacker in Sandusky, Oklahoma. Mr. Wacker testified that he arrived at the bar at approximately 3:00 p.m. and appellant was already there. Mr. Wacker stated that appellant was drinking at that time and was very argumentative and disruptive toward the other customers.

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Appellant left Mick's Place with a woman to go to another bar to drink at 8:30 p.m. or 9:00 p.m. He returned an hour or an hour and one-half later in a more

intoxicated condition and remained at Mick's Place until it closed. Although the Wackers tried to persuade appellant to stay overnight at their apartment, he insisted on driving back to his home in Kansas. The evidence is inconclusive as to the exact time of appellant's departure. Dee Wacker testified that appellant drove away from the bar between 12:50 a.m. and 1:00 a.m. on December 9, 1984, while Michael Wacker estimated appellant's departure time as between 1:00 a.m. and 1:10 a.m. There was evidence presented that the clock in the bar was set back ten minutes.

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The persons with whom the Gillilands spent the evening of December 8, 1984, also testified. Collectively their testimony reveals that on this evening the victims were guests in the home of Carl Bonner. The Gillilands, along with the other guests, left the Bonner residence at approximately 1:00 a.m. on December 9, 1984, and arrived at Highway 43 somewhere around 1:00 a.m. to 1:05 a.m.

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The officers returned to appellant's home and read him his *Miranda* warnings. During a brief period of questioning, appellant admitted delivering hay to Arkansas on the previous day but refused to tell the time he returned home. The vehicle was impounded after

appellant's arrest and remained in the custody of the Kansas authorities until December 21, 1984. The vehicle was examined and various paint and glass samples were removed on December 11, 1984, and on December 21, 1984.

It is well settled that an officer may conduct searches and make seizures without a warrant if consent is given to the search. Ark. R. Crim. P. 11.1. Additionally, any weapons or other things used or likely to be used as means of committing a criminal offense are permissible objects of seizure. Ark. R. Crim. P. 10.2.

Here, appellant gave the authorities consent to view his vehicle; however, even absent such consent, the appellant had no reasonable expectation of privacy to the outside of his tractor-trailer parked on a public street in front of a tavern. *See, e.g., Cardwell v. Lewis*, 417 U.S. 583 (1974). Upon viewing the vehicle, the police had probable cause to believe that appellant's vehicle was the instrument of the deaths and was the item to be seized and examined for evidence. While this issue has not arisen in this state, other jurisdictions have addressed the seizure of vehicles because of their potential evidentiary value as the "instrumentality of the crime."

In the recent case of *People v. Griffin*, ____ Cal.3d____, 761 P. 2d 103, 251 Cal. Rptr. 643 (1988) the Supreme Court of California upheld the warrantless search of the defendant's impounded truck on the

ground of the "instrumentality " exception to the warrant requirement, i.e., that the vehicle itself was an instrumentality of the crime or was itself evidence. In *Griffin*, the appellant's van had a bloody shoe print on the floorboard which appeared to match a bloody shoe print found at the scene of the murder. The court found that the bloodstains that had soaked into the floorboard of the truck were clearly an appropriated subject of scientific examination and within the limits of the instrumentality exception.

In the vehicular assault case of *People v. Zamora*, 695 P.2d 292 (Colo. 1985) the court upheld the warrantless search of an impounded automobile because it was legally seized as evidence itself based on the victim's description of the car and identity of the driver. The court held that when an object is lawfully seized and the police have a reasonable belief that the object is itself evidence of the commission of a crime, a subsequent examination of the object made proximate in time to the seizure, and undertaken for the purpose of determining its evidentiary value, is not an unlawful search.

In *People v. Teale*, 70 Cal.2d 497, 450 P.2d 564, 75 Cal. Rptr. 172 (1969) the court upheld the warrantless seizure of an automobile in which police had cause to believe that the victim was shot. The officers seized the car incident to lawful arrest and ten days later the car was examined by a criminologist who found the victim's

blood splattered on the interior. In that case the court found no violation of the fourth amendment because the automobile was itself evidence subject to seizure. The court analogized the situation to a case in which a person suspected of homicide is found in possession of a gun. It stated that it has never been held that a search warrant is necessary to enable the police to perform ballistic testing to determine if the gun was the one used in the killing. The *Teale* court, quoting *People v. Webb*, 66 Cal. 2d 107, 424 P. 2d 342, 56 Cal. Rptr. 902 (1967) also stated:

> The implication is that when the police lawfully seize a car which is itself **evidence** of a crime rather than merely a container of incriminating articles, they may postpone searching it until arrival at a time and place in which the examination can be performed in accordance with sound scientific procedures.

Teale, 66 Cal.2d at ____, 450 P.2d at 570-571, 75 Cal. Rptr. at 178-79.

This principle was again followed in *State v. Lewis*, 22 Ohio St. 2d 125, 258 N.E.2d 445, *cert. denied*, 400 U.S. 959 (1970), where it was held that since there was reasonable ground to believe that defendant's automobile was an instrumentality used in committing a murder, removal of paint samples for

scientific examination was neither a search nor a seizure. No search warrant was required to validate the examination even though the examination was conducted at a place and time remote from the seizure.

The propriety of a warrantless seizure and search where the vehicle is the evidence or instrumentality of a crime is implicit in several United States Supreme Court decisions as well. *See e.g., Cardwell v. Lewis*, 417 U.S. 583 (1974); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Cooper v. California*, 386 U.S. 58 (1967); *Carroll v. United States*, 267 U.S. 132 (1925).

In reviewing a trial judge's ruling on a motion to suppress, we make an independent determination based on the totality of the circumstances. We reverse only if the trial judge's ruling was clearly against the preponderance of the evidence. *Cook v. State*, 293 Ark. 103, 732 S.W.2d 462 (1987). Additionally, the trial judge has discretion in deciding evidentiary issues and his decision will not be reversed on appeal unless he has abused his discretion. *Hoback v. State*, 286 Ark. 153, 689 S.W.2d 569 (1985). Based upon our independent determination, the total circumstances reveal that the officers lawfully seized appellant's vehicle as a permissible object of seizure after viewing it with his consent. Upon inspection of the vehicle, the police

had a reasonable belief that it was evidence of the commission of a crime. Since the initial seizure was legal and since the reason for and nature of the custody of the vehicle was to use it as evidence, the subsequent warrantless searches were not unconstitutional. From the facts stated and the cases listed above, we find no error in the trial court's denial of the motion to suppress nor do we find that the trial court abused its discretion in allowing in evidence obtained from the search and seizure of appellant's vehicle. Therefore, the case must be affirmed.

Affirmed.

Cooper and Mayfield, JJ., agree.